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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

MATTHEW CHRIST,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The questions presented, over which the Seventh Circuit entered a decision in conflict with the eleven other United States courts of appeals on the same matter, are:

1. Whether the Fifth and Sixth Amendments permit a court to determine whether the Government is offering evidence of a single or multiple conspiracies merely upon review of an indictment; or does such a determination require an individualized analysis of the evidence presented.

2. Whether Petitioner was improperly and unfairly prejudiced by the admission of evidence not in furtherance of the central conspiracy charged in the indictment.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Matthew Christ respectfully petitions for a writ of certiorari to review the decision and order of the United States Court of Appeals for the Seventh Circuit affirming his conviction.

OPINIONS BELOW

The order of the United States Court of Appeals for the Seventh Circuit (Appendix attached hereto ("App.") 1a-29a) is available at *United States v. Christ*, 513 F.3d 762 (7th Cir. 2008). The district court's unreported memorandum opinion (App. 30a-36a) is available at *United States v. Christ*, No. 03-cr-1093, 2007 WL 625528 (N.D. Ill. Feb. 21, 2007).

STATEMENT OF JURISDICTION

This case involves a criminal prosecution and the district court had jurisdiction pursuant to 18 U.S.C. § 3231. The district court entered judgment against Petitioner on March 1, 2007. Petitioner was found guilty of one count of violating 18 U.S.C. § 371 and sentenced to 24 months imprisonment, a $5,000 fine and three years supervised release. The Seventh Circuit, which had jurisdiction pursuant to 28 U.S.C. § 1291, entered an order affirming the district court's judgment on January 28, 2008. (App. 1a-29a.) The Seventh Circuit denied Petitioner's petition for rehearing on April 24, 2008. (App. 41a-42a.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

U.S. CONST. amend. V provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. VI provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Part I, Chapter 19, Section 371 of the United States Criminal Code (U.S.C.A.), 18 U.S.C.A. § 371 *et seq.* provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

Part I, Chapter 75, Section 1546 of the United States Code (U.S.C.A.), 18 U.S.C.A. § 1546 *et seq.* provides:

> (a) Whoever knowingly forges, counterfeits, alters, or falsely makes any immigrant or nonimmigrant visa, permit, border crossing card, alien registration receipt card, or other document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States . . . knowing it to be forged, counterfeited, altered, or falsely made, or to have been procured by means of any false claim or statement, or to have been otherwise procured by fraud or unlawfully obtained;
>
> . . . .
>
> Shall be fined under this title or imprisoned not more than 25 years (if the offense was committed to facilitate an act of international terrorism (as defined in section 2331 of this title)), 20 years (if the offense was com-

mitted to facilitate a drug trafficking crime (as defined in section 929(a) of this title)), 10 years (in the case of the first or second such offense, if the offense was not committed to facilitate such an act of international terrorism or a drug trafficking crime), or 15 years (in the case of any other offense), or both.

STATEMENT

Following a jury trial, Petitioner was convicted of conspiracy to commit visa fraud under 18 U.S.C. § 371, with 18 U.S.C. § 1546 as the underlying offense. Petitioner was tried in the United States District Court for the Northern District of Illinois. Petitioner appealed, arguing that the district court erred in allowing the Government to use evidence of two separate alleged conspiracies to convict Petitioner of only one charged conspiracy.

The Seventh Circuit affirmed Petitioner's conviction but did not conduct a separate analysis to determine whether the Government used evidence of two conspiracies to prove one. Instead, the Court essentially held that the words of the Government's indictment were dispositive as to whether the Government was using evidence of one conspiracy or multiple conspiracies to prove the charged crime.

Petitioner seeks review because the Seventh Circuit's analysis squarely conflicts with the method used by all other courts of appeals to determine whether the Government can admit evidence of multiple alleged conspiracies to prove

one charged conspiracy. Additionally, Petitioner seeks this Court's review because the Seventh Circuit wrongly decided an important and recurring issue that substantially affects the constitutional rights of the criminally accused.

A. The Constitutional Contours of a Conspiracy Charge

The federal conspiracy statute, 18 U.S.C. § 371, criminally penalizes two or more people who conspire to commit an offense against the United States, conspiracy being a "partnership in criminal purposes." *United States v. Kissel*, 218 U.S. 601, 608 (1910). "A conspiracy by definition is a criminal agreement for a *specific* venture." *United States v. Williams*, 341 U.S. 70, 94 (1951) (Douglas, J., dissenting on other grounds). A conspiracy is completed when its specific purpose is accomplished. *United States v. Maloney*, 71 F.3d 645 (7th Cir. 1995); *United States v. Williamson*, 53 F.3d 1500 (10th Cir. 1995). 18 U.S.C. § 371 proscribes two separate kinds of conduct: conspiracies to commit offenses that violate specific statutes and conspiracies to defraud the United States. In this case, the Government charged Petitioner with a conspiracy to violate 18 U.S.C. § 1546.[1]

The Fifth Amendment provides that no person shall be deprived of life, liberty, or property without due process. The Fifth Amendment gives an accused the right to be tried on charges con-

[1] 18 U.S.C. § 1546 makes it a crime to use, obtain, or receive documents prescribed by regulation for entry into or as evidence of authorized stay in the United States, knowing them to have been unlawfully procured by means of fraud.

tained in the indictment, to provide fair notice and an opportunity to defend against specific allegations of misconduct. The Sixth Amendment provides the criminally accused with the right to be informed of the charges against him and the right to a fair trial by an impartial jury. Together, they give the accused the right to be tried on charges contained in the indictment, to provide fair notice and an opportunity to defend against specific allegations of misconduct. *Stirone v. United States*, 361 U.S. 212, 217 (1960). A criminal defendant is denied his Fifth and Sixth Amendment rights when the jury uses evidence from separate conspiracies to convict the defendant of one conspiracy. *Kotteakos v. United States*, 328 U.S. 750 (1946).

B. Factual and Procedural Background

The indictment charged Petitioner with bribery under 18 U.S.C. § 201—a charge of which he was acquitted—along with visa fraud conspiracy, and bribery was the essence of the Government's case. It contended that Petitioner, a West Point graduate who worked as a consular officer at the American Embassy in Vilnius, Lithuania from 1999 until 2001, provided non-immigrant visas to four Lithuanians in exchange for a motorcycle. Before trial, the Government voluntarily dismissed a count in the indictment alleging a broader conspiracy, and thus the charged conspiracy was quite narrow. The Government's evidence established that Petitioner did, in fact, acquire a motorcycle, but the jury acquitted because the evidence showed that Petitioner intended to purchase the motorcycle and that he legitimately completed the transaction within the

bounds of the law. The conspiracy conviction likely resulted from the erroneous admission of evidence of a separate, unrelated alleged conspiracy, not charged as a separate crime and not offered under Federal Rule of Evidence 404(b). The trial court admitted evidence, alleged in the indictment, of later conversations and interactions between Petitioner and two other Lithuanians. This evidence, at best, showed an agreement to obtain visas that was entirely separate and distinct from the motorcycle transaction.

The Government contended that Petitioner engaged in the visa fraud conspiracy with four Lithuanians: Valdas Stauga ("Valdas"), Aivaras Grigaitis ("Aivaras"), Mindaugas Masiliunas ("Mindaugas") and Robertas Grigaitis ("Robertas"). The Government chose not to call Valdas, but did call the three other co-conspirators to testify. Two of the alleged co-conspirators testified that they never entered into an agreement with Petitioner to provide a motorcycle in exchange for visas, but more at issue here is the fact that none of the alleged co-conspirators claimed that the goals of the alleged initial arrangement extended beyond the alleged sole agreement to provide a motorcycle in exchange for four visas. In fact, the Government did not present any evidence establishing that Petitioner and the co-conspirators' agreement was broader than the specific motorcycle for visas transaction.

At trial, Mindaugas and Robertas both failed to state that there was any agreement among any of the co-conspirators and Petitioner to accept a bribe or to falsify information on a visa applica-

tion form. With the testimony of two alleged conspirators failing to show—indeed, refuting the allegations of—an agreement or conspiracy, the Government introduced the testimony of Aivaras. Although Aivaras testified that he filled out portions of Robertas's and Mindaugas's applications at the direction of Petitioner, he never stated that he told Petitioner that the information was false, nor that Petitioner told him to write false information, nor that Petitioner had any way of knowing that the information on the applications was false, nor that there was an agreement between Petitioner and anyone else to provide false information on the applications. The Government showed Aivaras all three applications, and each time he testified that he filled out the application. Yet, a comparison of the handwriting on all three applications clearly showed that they were prepared by different people.

The issue here is that the Government did not confine its evidence to the events surrounding the issuance of the four visas in exchange for the motorcycle. Over Petitioner's strenuous objection, the Government introduced extraneous, irrelevant evidence in an effort to confuse the issues and prejudice the jury. Through the testimony of four separate witnesses and the introduction of twelve exhibits, the Government heavily emphasized the importance of evidence related to attempts to obtain three other visas—those for the wife and children of Robertas ("family visas"). Testimony regarding the family visas formed a substantial portion of the Government's case, even though referrals and applications for these visas were processed on February 8, 2001, *ten*

months after the last of the four visas forming part of the charged conspiracy were issued. At no point did the trial court conduct the required analysis to determine whether this evidence actually went toward a separate uncharged conspiracy.[2] The facts surrounding the family visa applications are truly separate from those relating to the conspiracy alleged in the indictment: therefore, we describe them separately here.

Aivaras testified that sometime between November and Christmas of 2000, at least eight months after his and Valdas's visas were issued, and one year after Robertas's and Mindaugas's visas were issued, he called Petitioner and asked for another meeting, hoping to obtain visas for the wife and children of Robertas. Aivaras testified that he put Robertas in touch with Petitioner.

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[2] The trial court admitted the evidence in a minute order, stating that it was intricately related to the charged crimes and arose out of the same transaction. (App. 37a-40a.) Despite its claims, the trial court actually supported its analysis by stating that the Government's indictment and Santiago proffer both assert that the family visa evidence was relevant because the acts were in "furtherance of the charged conspiracy to illegally obtain visas." (App. 39a); *see United States v. Santiago*, 582 F.2d 1128 (7th Cir. 1978) (The Seventh Circuit follows a practice whereby the Government must set forth, in a proffer memorandum, its evidence of a conspiracy and statements it intends to offer as co-conspirator statements under *Bourjaily v. United States*, 483 U.S. 171 (1987), prior to trial). So, like the Seventh Circuit, the trial court actually limited its analysis to a blind acceptance of the Government's assertions in the charging instrument and did not conduct a thorough investigation of the totality of the circumstances to see if the Government's assertions were actually true. *See, e.g., United States v. Gibson*, 170 F.3d 673, 681 (7th Cir. 1999).

Robertas testified that he contacted Petitioner and gave him visa applications which he had filled out for his wife and children. He also testified that he never offered anything to Petitioner in exchange for the visas, and that he could not say that even if he had offered something, Petitioner would have accepted it. Moreover, there was no allegation or evidence that there was any intent or agreement with Petitioner to provide false information on the family visa applications.

The Government also introduced into evidence the visa applications, referral forms, and other embassy records for the family visas. This evidence indicated that Petitioner had referred the applicants for expedited processing. At no point was any evidence introduced that Valdas or Mindaugas, two of the alleged co-conspirators, knew anything about the family visas or that they agreed to help obtain the visas.

On appeal, the Seventh Circuit also failed to analyze whether the Government was actually using evidence of two distinct conspiracies to prove one but, instead, deferred to the Government's indictment. In short, the Seventh Circuit concluded that the indictment included evidence of the family visas because that transaction was part of an alleged broader conspiracy between Petitioner and the four Lithuanians. (App. 11a-12a.) The Seventh Circuit claimed that the charged conspiracy between Petitioner and the four Lithuanians was not limited to one agreement to provide four visas in exchange for a motorcycle. Rather, the Seventh Circuit found that, based on the Government's charging

papers, Petitioner and the four Lithuanians were involved in an ongoing conspiracy to continue to provide visas, and the acts relating to the family visas were overt acts in furtherance of the charged conspiracy. (App. 12a.)

Neither the Seventh Circuit nor the district court applied the test uniformly used by all other Circuits to determine whether multiple conspiracies exist. At no point was there any actual analysis of the assertions created by the Government's evidence. Instead, the Seventh Circuit deferred to the Government's indictment to find only one conspiracy and cited different sections of the indictment to establish that the Government did not intend to limit its allegations of conspiracy to the procurement of the co-conspirators' visas. With this interpretation, the Seventh Circuit failed to use the appropriate test that would have clarified the Government's allegations and established that the presented evidence actually alleged two separate and distinct agreements. Or, stated differently, the Seventh Circuit would have found that the acts relating to the family visas were not overt acts in furtherance of the charged conspiracy and, thus were irrelevant and inadmissible. As a result, on January 28, 2008, the Seventh Circuit affirmed the district court's opinion, and, on April 24, 2008, the Seventh Circuit denied appellant's application for rehearing.

This petition followed.

REASONS FOR GRANTING THE WRIT

This case presents an important and recurring question of federal law on which the Seventh Circuit has split from other Circuits. When analyzing whether the Government's proffered evidence attempts to establish one multi-object conspiracy or multiple conspiracies, courts conduct a totality of the circumstances analysis. However, the Seventh Circuit engaged in a radical and dangerous departure from this accepted approach when it ignored the actual state of the evidence and, instead, blindly followed the indictment charge of one conspiracy. This analysis violates a defendant's rights to a fair trial and misinterprets federal conspiracy law. Certiorari should be granted to resolve this conflict and clearly delineate how federal conspiracy claims are to be litigated in federal court.

I. THE SEVENTH CIRCUIT DEFERRED TO THE INDICTMENT, INSTEAD OF CONDUCTING AN INDEPENDENT ANALYSIS, TO DETERMINE WHETHER THE EVIDENCE PRESENTED PROVED ONE CONSPIRACY OR MULTIPLE CONSPIRACIES, AND IT WAS CLEAR FROM THE FACTS THAT THE GOVERNMENT WAS PRESENTING EVIDENCE OF TWO CONSPIRACIES

The Seventh Circuit did not analyze the actual assertions created by the charged evidence and instead deferred to the charge contained in the indictment, concluding that because the indictment charged one conspiracy, the evidence proved one conspiracy. In its opinion, the Sev-

enth Circuit stated, "By alleging that part of Petitioner's role in the conspiracy was to procure visas for the four co-conspirators in exchange for a motorcycle, the Government in no way limited the charged conspiracy to that conduct." (*See* App. 11a.) Then, the Seventh Circuit cited the indictment three times to assert that the Government intended to charge a conspiracy with broader aims than the visas for motorcycle transaction. The Court pointed out that the indictment alleged a conspiracy date range that encompassed the family visa transaction, the indictment's broad allegations included the acts allegedly committed during the family visa transaction, and the indictment cited the family visa evidence as overt acts in furtherance of the conspiracy. (*See* App. 11a-12a.) After interpreting the words of the indictment, the Court claimed that " '[n]othing could be more intricately related and intertwined than an allegation that is brought as a charge by the Government.' " (*See* App. 12a) (citing *United States v. Elizondo*, 920 F.2d 1308, 1319 (7th Cir. 1990).

Yet, the evidence in this case clearly attempted to prove two conspiracies, not one. First, the evidence demonstrated that the five alleged co-conspirators—Petitioner and the four Lithuanians —shared one narrow goal of exchanging four visas for a motorcycle. No evidence indicated that the defendants were aware that the conspiracy would embrace the acquisition of additional visas through illegal means. No evidence indicated that the co-conspirators discussed the family visas when entering the initial agreement, and no evidence showed that the co-conspirators

agreed to an extended conspiracy beyond the one initial transaction. At most, the Government's evidence showed that, *at least eight months after* the alleged visas for motorcycle transaction, *one* of the initial co-conspirators contacted Petitioner regarding a second visa for motorcycles exchange. This evidence demonstrated an entirely different common goal than the initial agreement. The initial co-conspirators had already accomplished their goal and acquired visas in exchange for a motorcycle. Now, new co-conspirators had the separate goal of acquiring their own visas.

The alleged conspiracy was also not of the type where the co-conspirators were aware that they were involved in a vertically integrated enterprise with multiple ongoing operations. The first alleged conspiracy in this case only involved five people and one transaction. Once the four Lithuanians received their visas and Petitioner received his motorcycle, the transaction was finished. Nothing in the nature of the visas for motorcycle scheme would have indicated to the co-conspirators that the conspiracy was an ongoing operation. Moreover, the actors in the two alleged conspiracies were not interdependent on each other. The co-conspirators had already successfully finished the visas for motorcycle transaction before any alleged discussion was ever held about the family visas. With their goal already accomplished, the co-conspirator's agreement certainly wasn't interdependent on the success of the family visa transaction.

Finally, not all of the participants overlap. No evidence indicated that Mindaugas or Valdas ever had any discussion with Petitioner about the

family visas or about an ongoing conspiracy to continue to acquire visas. Additionally, there is no logical reason for Mindaugas or Valdas to have been involved in an extended conspiracy. According to the evidence, they had already obtained their visas and stood to gain nothing from the acquisition of the family visas. Yet, the indictment accused them of being co-conspirators of a larger conspiracy and then attempted to characterize evidence of the family visas as overt acts of that conspiracy.

II. THE SEVENTH CIRCUIT'S DECISION CONSTITUTES A DEPARTURE FROM ESTABLISHED LAW AND IS A NEW STANDARD, BECAUSE THE ESTABLISHED LAW OF OTHER CIRCUITS REQUIRES A FACTUAL ANALYSIS OF THE EVIDENCE AND DOES NOT PERMIT A DECISION BASED SOLELY ON A REVIEW OF THE INDICTMENT

Instead of using the analysis applied by all other circuits, the Seventh Circuit erred and created a new standard: as long as the indictment charges only one conspiracy, the evidence only goes toward one conspiracy, no matter the actual circumstances of the facts. The Seventh Circuit's failure to conduct a totality of the circumstances analysis in this case has created a circuit split with serious implications for the future of conspiracy law in the United States. Before this decision, the Seventh Circuit applied a totality of the circumstances approach to determine whether the evidence presented pursuant to an indictment charging one conspiracy proved multiple conspiracies or one conspiracy with several

objects. *See, e.g., United States v. Varelli*, 407 F.2d 735 (7th Cir. 1969).

This approach is consistently applied in all other circuits by analyzing the following three factors: (1) commonality of goals; (2) nature of the scheme; and (3) overlapping of participants in the various dealings. *See United States v. Morrow*, 39 F.3d 1228 (1st Cir. 1994) (analyzing the evidence to find multiple conspiracies where the evidence failed to show that overlapping participants were aware that the conspiracy embraced multiple frauds and the nature of the scheme was not the type where multiple crimes could be inferred); *United States v. Martino*, 664 F.2d 860 (2d Cir. 1981) (analyzing the evidence to find a multi-object conspiracy where the participants knew they were part of a vertically integrated enterprise to distribute narcotics, and the conspiracy could not stop with their particular buyers and sellers); *United States v. Perez*, 280 F.3d 318 (3d Cir. 2002) (analyzing the evidence to find one multi-object conspiracy to distribute narcotics when defendants were present at the ringleader's apartment while the shipment was being distributed, and were aware of arrangements to sell drugs with other alleged co-conspirators prior to the arrest); *United States v. Leavis*, 853 F.2d 215 (4th Cir. 1988) (analyzing the evidence to find one conspiracy when an eight month break between two separate instances of importing cocaine demonstrated the existence of two separate conspiracies); *United States v. Richerson*, 833 F.2d 1147 (5th Cir. 1987) (analyzing the evidence to find one conspiracy to commit mail fraud, not three, when all participants had

the goal of personal gain through the fraud, the nature of the scheme depended on the willingness of each member to perform his function, and the defendants all worked through a single "key man"); *United States v. Hughes*, 895 F.2d 1135 (6th Cir. 1990) (analyzing the evidence to find one multi-object conspiracy when the nature of the scheme created an interdependent relationship between two alleged separate components and when, without both components, the scheme would have failed); *United States v. Kragness*, 830 F.2d 842, 862-63 (8th Cir. 1987) (analyzing the evidence to find one conspiracy when the defendants participated in separate ventures of one overall scheme to distribute narcotics); *United States v. Bibbero*, 749 F.2d 581 (9th Cir. 1984) (analyzing the evidence to find the defendant accountable for earlier shipments because the key players and method of a drug smuggling scheme remained constant and the defendant knowingly joined during the fifth and sixth shipments); *United States v. Edwards*, 69 F.3d 419, 432 (10th Cir. 1995) (internal citations omitted) (analyzing the evidence to find one conspiracy because the evidence demonstrated interdependence among the defendants when they engaged "in a consistent series of smaller transactions that furthered its ultimate object of supplying the consumer demand of the market"); *United States v. Plotke*, 725 F.2d 1303 (11th Cir. 1984) (analyzing the evidence to find one conspiracy when several instances of arson to defraud insurance companies occurred but the goal of the conspiracy was to extend the wealth of one family, the nature of the scheme required personnel changes as different homes were burned, there

was a striking similarity between the fires which destroyed the homes, and each home that was burned belonged to a relative of one "key player"); *United States v. Tarantino*, 846 F.2d 1384, 1392-93 (D.C. Cir. 1988) (analyzing the evidence to find one conspiracy where all co-conspirators shared the common goal to distribute cocaine and all knew of their dependence on the other co-conspirators).

III. THE SEVENTH CIRCUIT'S FAILURE TO CONDUCT THE TOTALITY OF THE CIRCUMSTANCES ANALYSIS VIOLATES CRIMINAL DEFENDANTS' CONSTITUTIONAL RIGHTS BECAUSE IT ALLOWS THE GOVERNMENT TO INTRODUCE EVIDENCE THAT IS NOT RELEVANT TO THE CHARGED CONSPIRACY, RESULTING IN AN UNCONSTITUTIONAL VARIANCE

Petitioner's Fifth and Sixth Amendment rights were violated when the Seventh Circuit did not conduct a factual analysis to analyze whether the Government was introducing evidence not relevant to the charged conspiracy. The Fifth and Sixth Amendments combine to provide the accused with a constitutional right to be tried on charges contained in the indictment, to provide fair notice and the opportunity to defend against specific allegations of misconduct. A simple variance occurs when the charging terms are unchanged, but the evidence at trial proves facts materially different from those alleged in the indictment. *Kotteakos*, 328 U.S. at 756. A variance prejudices the defendant when there is a substantial likelihood that the jury could use evidence from one

conspiracy to find the defendant guilty of an entirely separate conspiracy. *Id.* at 776-77.

The traditional totality of the circumstances analysis protects criminal defendants from prejudicial evidence, but the Seventh Circuit's new approach does not because it allows the jury to use evidence from unrelated, irrelevant acts to convict a defendant of one conspiracy, so long as the prosecution alleges the overt acts in the indictment and characterizes them as going to one conspiracy. The prosecution is now able to confuse the jury by inserting "overt act evidence" from multiple conspiracies into an indictment that alleges only one overall conspiracy, thus introducing vague notions of cumulative wrongdoing and risking the chance that each jury member could then convict the criminal defendant of conspiracy based upon individual interpretations of a conglomerate of unrelated and confusing evidence.

IV. HAD THE SEVENTH CIRCUIT CORRECTLY APPLIED THE TOTALITY OF THE CIRCUMSTANCES TEST, IT WOULD HAVE FOUND THAT THE DISPUTED EVIDENCE WAS NOT IN FURTHERANCE OF THE CENTRAL CONSPIRACY CHARGED IN THE INDICTMENT

The present case is a perfect example of the prejudicial impact of the Seventh Circuit's new analysis. A conspiracy ends "when its main criminal objective has been accomplished." *Maloney*, 71 F.3d at 645; *Williamson*, 53 F.3d 1500. Here, the indictment and Santiago proffer charged that actions related to the family visas were overt

acts in furtherance of the charged conspiracy, but the actions regarding the family visas were distinct in time and object from the agreement to provide a motorcycle for visas transaction. All four of the alleged co-conspirator's visas were obtained at least eight months prior to the separate set of events surrounding the family visas. Therefore, any attempts to obtain visas for the Robertas family could not have been in furtherance of a conspiracy whose object had been fulfilled a year earlier.

Petitioner was clearly prejudiced by the family visas evidence because the jury might have convicted Petitioner of one conspiracy by combining overt acts from two separate conspiracies. *See Kotteakos*, 328 U.S. at 750. Indeed, it is beyond dispute that the family visa evidence played a substantial role in Petitioner's conviction. The Government called four witnesses and offered twelve exhibits on this subject, and evidence on this point consumed nearly half the trial. While the jury never heard evidence showing any illegality related to these visas—which were never issued—at least one Government witness attempted to suggest that there was improper conduct by Petitioner. (*See* App. 4a-9a.)

Had the Seventh Circuit properly defined the scope of the charged conspiracy through use of the totality of the circumstances test, it could not have held that the trial court's admission of family visa evidence was proper. As long as the Seventh Circuit continues to defer to the indictment instead of analyzing the facts, this prejudice will continue in criminal trials for conspiracy.

V. THE SEVENTH CIRCUIT'S DECISION POSES A SUBSTANTIAL RISK TO THE RIGHTS OF OTHER CRIMINAL DEFENDANTS ACCUSED OF CONSPIRACY

The crime of conspiracy is charged frequently in the federal courts. In 2006, the Government accused 586 criminal defendants of a conspiracy to defraud the United States.[3] Legal commentators claim that more than one-quarter of all federal criminal prosecutions involve allegations of conspiracy. Neal Katyal, *Conspiracy Theory*, 112 Yale L.J. 1307, 1310 (2003). Thus, there is a substantial need for clarity and uniformity in the application of conspiracy law.

Courts use the scope of a conspiracy to decide various legal issues, including admissibility of evidence, substantive responsibility for co-conspirator acts, overt act requirements, and joinder. *Kotteakos*, 328 U.S. at 774. Perhaps no aspect of conspiracy law is more significant than the scope to be accorded to the "singleness or multiplicities" of conspiratorial relationships, yet conspiracy law's complexity can lead to confusion in trial courts. *Id.* at 767 ("One difficulty with this is that the trial court itself was confused.").

Considering the frequency with which federal courts address conspiracy law, its complexity, and its importance in criminal prosecutions, the Seventh Circuit's new approach poses a risk to future criminal defendants accused of conspiracy. The courts, prosecutors and defendants would all

[3] Statistical Tables for the Federal Judiciary as prepared by the Administrative Office of the U.S. Courts, found at http://www.uscourts.gov/stats/index.html.

benefit from a clear statement of the law, unified among the circuits, on this issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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